

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF: BID PROTEST
DESAUSSURE COLLEGE ROOF
REPLACEMENT
STATE PROJECT H27-9984-MP
MIDWEST MAINTENANCE, INC.
vs.
UNIVERSITY OF SOUTH CAROLINA

DECISION

POSTED: April 15, 2004

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Midwest Maintenance, Inc. ("MMI") under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (the "Code"), for an administrative review of the DeSaussure College Roof Replacement Project (the "Project") for the University of South Carolina ("USC"). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. A decision is issued without a formal hearing after a thorough review of the bidding documents and the applicable law.

NATURE OF THE PROTEST

USC solicited bids for the Project. Bids were opened and evaluated. USC determined that the bid of MMI was non-responsive and set MMI's bid aside. USC posted a Notice of Intent to Award the contract to another firm. MMI protests this action.

FINDINGS OF FACT

1. On February 23, 2004 USC solicited bids for the Project in *South Carolina Business Opportunities*. [Exh. 1]
2. The Bidding Documents contain SE-330, *Bid Form*, which requires (on page BF-2), the prime bidder to list the name of the firms proposed to accomplish the Project roofing work. [Exh. 2]
3. On March 10, 2004 USC issued Addendum No. 1 to the Bidding Documents, which addendum contained a copy of the minutes of the pre-bid meeting and list of attendees. [Exh.

- 3] On page PBM-2, the minutes include the statement "Require the names of subcontractors on items listed in your bid form or list your firms [sic] name at that location. Do not leave it blank."
4. On March 16, 2004 USC received, opened, read aloud and recorded bids for the Project. A total of four bids were received as shown on the tabulation. [Exh. 4] The tabulation notes that MMI's bid was found non-responsive.
 5. On March 17, 2004 USC obtained verification of the licensing status of MMI and Carolina Roofing, Inc. ("CRI") [Exh. 5]
 6. USC summarized the results of its investigation in an email dated March 18, 2004 between USC and the OSE. [Exh. 6]
 7. On March 18, 2004 USC issued SE-370, *Notice of Intent to Award*, in favor of Murton Roofing of SC, Inc. ("Murton"). [Exh. 7]
 8. On March 22, 2004 USC informed MMI that its bid had been declared non-responsive. [Exh. 8].
 9. On April 2, 2004 MMI submitted a formal protest of the proposed award to Murton. [Exh. 9]
 10. Based on the evidence, as confirmed by conversation with Mr. Ron Galloway, Executive Director of the South Carolina Contractor's Licensing Board, MMI does not possess a license to perform specialty roofing work.

DISCUSSION

PROTESTANT'S POSITION

MMI petitions the CPOC to find in its favor on any one of four grounds, as stated more fully in Exh. 8.

1. USC lacked a compelling reason to disqualify MMI as a bidder as required by §11-35-3020(2)(c) of the Code.

...Unless there is a compelling reason to reject bids as prescribed by regulation of the board, notice of an intended award of a contract to the lowest responsive and responsible bidder whose bid meets the requirements set forth in the invitation for bids shall be given by posting such notice at a location...

2. That MMI's failure is a minor informality or irregularity susceptible to correction or waiver pursuant to §11-35-1520(13) of the Code.

...A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders.

3. That USC's determination of non-responsiveness was inadequate in that it did not provide sufficient factual grounds and reasoning for an objective review of the decision.
4. That the basis for the disqualification was an issue of responsibility and was not supported by a written determination as required by §11-35-1810(2) of the Code and Board Regulation 19-445.2125(E).

(2) Determination of Nonresponsibility. A written determination of nonresponsibility of a bidder or offeror shall be made in accordance with regulations promulgated by the board.

E. Written Determination of Nonresponsibility. If a bidder or offeror who otherwise would have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the Chief Procurement Officer or the procurement officer of the governmental body.

RESPONDENT'S POSITION

USC maintains that MMI does not possess the requisite licenses to perform the roofing work of the Project. USC has characterized this lack as an issue of responsiveness and declared MMI to be non-responsive.

CPOC FINDINGS

This case involves the replacement of the roof of a building located on USC's Columbia campus. The general scope of work involves the installation of a slate tile roof over the majority of the structure and a built-up roof over two areas totaling approximately 1000 sq. ft. The Code requires that awards for construction contracts be made to bidders who have been found to be both "responsive" and "responsible." This protest is specifically directed at the Subcontractor Listing section of the Bid Form, which is replicated below as it was completed by MMI.

Subcontractor Specialty (completed by AE)	Subcontractor's Name or Prime Bidder's Name (completed by Bidder)	Subcontractor's SC License Number (for information)
	BASE BID WORK	
Roofing	Midwest Maintenance, Inc.	96538
Carpentry	Midwest Maintenance, Inc.	96538
	Carolina Roofing, Inc.	95962

The Issue of Responsiveness

The first question before the CPOC is whether the Bid Form as submitted by MMI can be read to support MMI's contention that it did submit a bid that met the State's standard for responsiveness.

A "responsive bidder" means the person who has submitted a bid which conforms in all material respects to the invitation for bids. [§11-35-1410(7) of the Code] Bids from individual bidders which fail to conform to the essential requirements of the invitation for bids shall be rejected. [Board Regulation 19-445.2070A]

The subcontractor listing requirement contains elements of both responsiveness and responsibility. However, the South Carolina Procurement Review Panel ("Panel") has determined that completion of the Bid Form's listing requirement renders the bid responsive with respect to the statutory subcontractor listing requirement¹.

In accordance with the Panel's ruling in *Brantley*, the CPOC finds that MMI clearly completed the subcontractor listing and is therefore its bid is responsive on its face. The protest is upheld on this issue.

Having found MMI's bid responsive, it is unnecessary for the CPOC to further address the protestant's arguments of "compelling need" and "minor informality" and the "sufficiency of the determination." The CPOC notes that a multitude of CPOC rulings and numerous Panel decisions spanning more than two decades have clearly established the law in this area of a "minor informality". A bidder's failure to properly complete the subcontractor listing is in no wise a

¹ See *In re: Protest of Brantley Construction Co., Inc.; Appeal by Brantley Construction Co., Inc.*, Panel Case 1999-3.

minor informality and will result in an automatic rejection of the bid as non-responsive pursuant to the express terms of §11-35-3020(2)(b)(ii) of the Code.²

The Issue of Responsibility

The second question before the CPOC is whether the Bid Form as submitted by MMI can be read to support MMI's contention that it did submit a bid that met the State's standard for responsibility.

The State's standards for responsibility are set forth in §11-35-1410(6) and Board Regulation 19-445.2125A(1)(4).

A. State Standards of Responsibility. Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has:

*(1) **available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;***

(2) a satisfactory record of performance;

(3) a satisfactory record of integrity;

*(4) **qualified legally to contract with the State; and***

(5) supplied all necessary information in connection with the inquiry concerning responsibility. [emphasis added]

The days of the single contractor who performs all construction work with its own forces is long gone. State construction projects more typically involve a general contractor and a number of firms with specialized expertise, each contributing to the team's combined "...capability to meet all contractual requirements."

The Code tasks agencies to require, and bidders to provide, a list of subcontractors proposed to perform the work of trade specialties meeting the statutory requirements. [§11-35-3020(2)(b)(i)] As noted by the Panel in *Brantley*, a bidder is entitled by statute to list itself as the performer of listed specialty work "...if the bidder is qualified to perform such work under the terms of the invitation for bids..."³ This is an issue of responsibility.

² See, for example, *In re: Protest of ECB Construction Company, Inc.*, Panel Case 1989-7, citing *In Re: Protest by Brown & Martin Co.*, Panel Case 1983-4. "The Panel found that something which by statute renders a bid nonresponsive cannot be characterized as a minor informality or irregularity."

³ See *In re: Protest of Brantley*, "However, the bidder's ability to do the work may be questioned, and to verify the bidder's capability, one must look beyond the bid documents. Because the state is no longer investigating the bidder's ability to perform, the state is no longer determining responsiveness of the bid, but deciding the responsibility of the bidder."

The CPOC notes that the subcontractor listing requirement is intended to fulfill two public policy goals—to protect the listed subcontractors from bid shopping by the general contractor, as well as to inform the procuring entity who will be performing significant portions of the work under the contract.

As replicated above, the standard Bid Form (SE-330) for the Project required the prime bidder to list a subcontractor or itself for "Roofing", one of two required trade specialties—Roofing and Carpentry. MMI argues that the Bid Form clearly indicates MMI's intent to use the services of Carolina Roofing, Inc. ("CRI") for that portion of roofing work requiring a Specialty Roofing license. It is well settled that a bidder may list both the general contractor and the subcontractor for a specialty area if both are providing a portion of the specialty work.

The CPOC disagrees with MMI's interpretation of the Bid Form. Simple examination of the Bid Form shows that MMI identified only itself to perform the Roofing specialty work—all of the Roofing work without qualification or limitation. Further, MMI did not associate CRI with either of the two listed subcontractor specialties. By failing to clearly define who will be performing the Roofing and Carpentry work, MMI opens the bidding process to unacceptable confusion and mischief in any of several scenarios. For example,

1. The CRI entry is placed directly below the listing for "Carpentry." It would be equally plausible for USC to interpret the bid form to conclude that CRI would perform a portion of the carpentry work.⁴ The State does not know to whom what work is subcontracted.⁵ A Bid Form susceptible to alternative interpretations does not support the State's obligations to accept bids "...unconditionally without alteration or correction. [§11-35-3020(2)(b)]
2. Without a defined area of responsibility, MMI could adjust or eliminate CRI's scope of work with impunity. CRI is open to having its bid shopped, to the mutual disadvantage of CRI and the State. [§11-35-3020(2)(i) "If the bidder determines to use his own employees to perform any portion of the work for which he would otherwise be required to list a subcontractor and if the bidder is qualified to perform such work under the terms of the invitation for bids, the bidder shall list himself in the appropriate place in his bid and not subcontract any of that work except with the approval of the using agency for good cause shown."]

⁴ Certainly roofers are well-known for performing carpentry work ancillary to the installation of a roof.

⁵ By way of further example, if Carolina Roofing, Inc. were named "Carolina Services," there would be no suggestion of the nature of work performed by the company. Likewise, the name Midwest Maintenance, Inc. does not connote a firm engaged in commercial general contracting.

3. In more complex projects with multiple specialty subcontractors, allowing a bidder the opportunity to redefine the scope of work of its proposed subcontractors after bid opening is tantamount to allowing subcontractor substitution as well as bid shopping. [§11-35-3020(2)(iii) " No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except for one or more of the following reasons:..."]

Although USC mistakenly characterized the results of its review of MMI's licensing status as a responsiveness determination, a closer examination of Exh. 6 shows that USC's concerns went to MMI's ability legally to perform the totality of the roofing work, one the listed factors in the State's standards of responsibility.

A license issued pursuant to the Contractors' Licensing Act (the "CLA"). [§40-11-5, *et. seq.* of the S.C. Code of Laws, annotated] is required to act as a contractor in this State.

*40-11-30. PRACTICING WITHOUT A LICENSE.—No entity or individual may practice as a contractor by performing **or offering to perform** contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.*[emphasis added]

It is undisputed by the parties that a portion of the roofing work of the Project involved "built up roofing", which is work regulated by the CLA [§40-11-410(4)(I)] The Contractors' Licensing Board (the "CLB") is the state authority primarily responsible for enforcing the provisions of the CLA. The CPOC and the Panel give great weight to the opinion of the CLB as to how the CLA should be interpreted and applied to a particular set of circumstances.⁶ The Executive Director of the CLB, has advised the CPOC that a portion of the roofing work of the Project requires a contractor with a Specialty Roofing license and that MMI does not possess such a license. The CPOC finds no reason to disagree with the position of the Board on this matter. MMI is not legally entitled to perform such work and cannot legally offer to perform such work, as stated in §40-11-30 of the CLA.

⁶ See *In re: Protest of Roofco, Inc.; Appeal by Moore Construction of York County, Inc.*, Panel Case 200-14(1). "Giving great deference to the order of the Contractor's Licensing Board, the Panel finds that Moore was not responsible to bid on the MUSC project because they lacked the proper license to do the work at the time the bid was made. **Further, the Panel will take this opportunity to state that the lack of a proper license to do the work solicited in a state contract will always render a bidder non-responsible.**" [emphasis added]

Following the Panel's position in *Roofco*, and given its confirmed lack of a proper license, MMI cannot be considered a responsible bidder for the roofing work of this Project. Because it was not qualified to perform the built-up roofing work with its own forces, MMI was required to list a qualified subcontractor to perform that work.

The Executive Director of the CLB has, however, advised the CPOC that CRI does possess such a license. MMI argues that the Bid Form clearly indicates MMI's intent to use the services of CRI for that portion of roofing work requiring a Specialty Roofing license. As noted above, the CPOC has found that MMI did not submit a Bid Form supporting this assertion. MMI argues that the information obtained by USC establishes MMI's intent to use CRI to perform the built-up roofing work. Neither MMI's intent nor USC's investigation or conclusions arising from that investigation are relevant to the decision in this case. What is relevant is whether MMI submitted a bid form which, on its face, clearly expressed a legally binding commitment to both the listed subcontractor and to the State in the subcontractor listing section of the Bid Form. The CPOC finds that MMI did not fulfill this obligation.

The CPOC finds that MMI was not a responsible bidder at the time of submission of its bid for the Project solely by virtue of its lack of a proper license to perform Specialty Roofing. Lack of a required license renders a bidder non-responsible at the time of bidding and is not subject to correction.⁷

PROTEST DENIED

DECISION

It is the decision of the Chief Procurement Officer for Construction that Midwest Maintenance, Inc. was a non-responsible bidder on the DeSaussure College Roof Replacement Project and that

⁷ See *In re: Roofco*, op.cit., [bidder did not possess Specialty Roofing license at time of bidding and subsequently obtained license] "However, the Panel finds that to allow a bidder to become responsible after the bid opening is not only in direct violation of the Procurement Code, but would also undermine the purpose of the Code to the procurement system which will promote increased public confidence in the procedures followed in public procurement."

the decision of the University of South Carolina to reject the bid of Midwest Maintenance, Inc. is upheld to the extent it is consistent with this Decision. The University of South Carolina may proceed, consistent with its programmatic needs, to award the contract for the Project to the lowest responsive and responsible bidder.

A handwritten signature in black ink, reading "Michael M. Thomas". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Michael M. Thomas
Chief Procurement Officer
for Construction

April 15, 2004
Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4210, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten calendar days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the Panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

Additional information regarding the protest process is available on the internet at the following web site: <http://www.state.sc.us/mmo/legal/lawmenu.htm>

NOTE: Pursuant to Proviso 66.1 of the 2002 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel [filed after June 30, 2002] shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2002 S.C. Act No. 289, Part IB, § 66.1 (emphasis added). PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."